No. 83-172

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

COURT HOUSE PLAZA COMPANY,

Petitioner,

v.

CITY OF PALO ALTO, ET AL.,

Respondents

On Petition From The United States Court of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

JEFFREY P. WIDMAN
SIMS & WIDMAN
Crocker Plaza
Suite 660
84 W. Santa Clara
San Jose, California 95115
Tel.:(408) 998-3400

Attorneys for Plaintiff and Petitioner

August 1983

QUESTIONS PRESENTED

1. Whether the doctrine of *res judicata* (claim-preclusion) should apply in an action for damages under 42 U.S.C. § 1983 after plaintiff has litigated only claims for equitable relief in state courts and governing state law did not recognize plaintiff's right to recover damages for inverse condemnation under the Fifth Amendment.

2. Should this Court now resolve the division among the circuit courts of appeals on the application of *res judicata* under 42 U.S.C. § 1983?

PARTIES: INDIVIDUAL RESPONDENTS

The individual parties not named as Defendants and Respondants in the caption of this Petition for Writ of Certiorari are STANLEY R. NORTON, BYRON D. SHER, FRED S. EYERLY, ROY L. CLAY, KIRKE W. COMSTOCK, SCOTT T. CAREY, JOHN J. BERWALD, ANNE R. WITHERSPOON, JOHN V. BEARS, Councilmen PETER R. CARPENTER, MARY GORDON, WILLIAM E. GREEN, JAY W. MITCHELL, EMILY M. RENZEL, ANNE STEINBERG, Planning Commissioners, STAN J. NOWICKI, Chief Building Inspector, JAMES O. GLANVILLE, Zoning Administrator, NAPTHALI H. KNOX, Director of Planning and Community Environment, ROBERT K. BOOTH, JR., City Attorney and LOUIS B. GREEN, Assistant City Attorney.

TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

TABLE OF AUTHORITIES CITED

Federal Cases

California Cases

TABLE OF AUTHORITIES (Continued)

CONSTITUTIONS

STATUTES

OTHER

JURISDICTIONAL GROUNDS

Petitioner's complaint in the district court alleged jurisdiction under 28 U.S.C. § 1331 based upon alleged violations of the Fifth and Fourteenth Amendments to the Constitution of the United States. In addition, the complaint alleged jurisdiction under § 1343 based upon alleged violations of the federal Civil Rights Act, 42 U.S.C. §§ 1981 and following. (See Appendix C.)

Respondents filed a motion to dismiss under FRCP, Rule 12(b), on the ground of *res judicata* and others. The district court granted the motion on June 4, 1982. (See Appendix A.) The district court's Order dismissing the complaint expressed its view that the decision of the Ninth Circuit in *Scoggin v. Schrunk*, 522 F.2d 436 (1975), *cert. denied*, 423 U.S. 1066 (1976), made *res judicata* applicable to all claims stated in Petitioner's complaint. Accordingly, the district court rendered judgment against Petitioner on June 4, 1982. Entry of judgment occurred on June 11, 1982 (Appendix A).

On July 6, 1982, Petitioner filed its notice of appeal to the Ninth Circuit Court of Appeals. The Ninth Circuit affirmed the judgment below in a memorandum decision and judgment entered on May 2, 1983 (Appendix B). On June 2, 1983, the Ninth Circuit issued its mandate to the district court (Appendix B).

This Court has jurisdiction of this Petition under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Amendment V.
2. United States Constitution, Amendment XIV, Sections 1 and 5.
3. 28 U.S.C. § 1738.
4. 42 U.S.C. § 1981.
5. 42 U.S.C. § 1982.
6. 42 U.S.C. § 1983.

The text of these constitutional and statutory provisions appears in Appendix C.

STATEMENT OF THE CASE

The district court dismissed the complaint because it believed that an earlier state-court suit for mandamus (the "Mandamus") precluded any subsequent action for damages under 42 U.S.C. § 1983. The Mandamus was the subject of a reported opinion by the California Court of Appeal, First District. *Court House Plaza Company v. City of Palo Alto*, 117 Cal.App.3d 871, 173 Cal.Rptr. 161 (1981). This Court denied review of that state appellate decision. *Court House Plaza Company v. City of Palo Alto, et al.*, No. 81-404, 454 U.S. 1074, *cert. denied* (November 30, 1981). Petitioner filed the complaint in this case before receiving this Court's order denying certiorari.

The complaint alleged historical facts that had been at issue in the Mandamus as well as ultimate facts concerning a taking of property (Fifth Amendment claims) and damages that had not been litigated in the Mandamus. (The parties were substantially the same in both the Mandamus and the subsequent federal action.)

The facts alleged in the complaint were essentially these:

On December 28, 1964 the City adopted a planned development zoning (the "P-C Ordinance") allowing professional and commercial office space use on Petitioner's property. The P-C Ordiance approved, by incorporation, detailed plans for construction of a ten-story office building. These plans included detailed drawings illustrating the location, elevation, and floor plan of the ten-story building, associated parking garage, and other details of site development such as landscaping. landscaping.

A development schedule formed part of the P-C Ordinance. Under that development schedule, Petitioner was required to start construction of Phase 1, consisting of the first four stories of the building and certain levels of the parking garage, within two years after the City's approval of the P-C Ordinance. By October 31, 1976 Petitioner was to commence construction of the remaining six stories of the building as well as additional

levels of the parking garage. In agreeing upon this development schedule, Petitioner and the City understood that phasing would enable Petitioner to coordinate completion of the ten-story building in accordance with the growth in demand for commercial office space in the City.

Petitioner began and completed the first four floors of the building in Phase 1 by August of 1967. In doing so, Petitioner actually commenced construction of Phase 2 physically. The portion of the office building completed in 1967 incorporated a foundation, structural steel, specially located heating and cooling equipment, elevator shafts, an interior smoke-proof tower, and oversized utility systems, all designed to accommodate the remaining six stories in Phase 2.

By early 1970, Petitioner had actually obtained building and use permits for completing the work on Phase 2. Petitioner had also fabricated the additional structural steel and two additional elevators in reasonable reliance upon the issuance of those permits. Petitioner made other investments in the reasonable expectation that Phase 2 would be completed.

The City and its officials committed numerous acts having one characteristic in common: intentional interference with Petitioner's efforts to complete Phase 2 under lawfully issued building and use permits before expiration of the development schedule. Perhaps most significant in terms of the City's policy was the adoption of an ordinance in 1973 limiting the height of new structures to a maximum of 50 feet in all but P-C zones. Improper and retroactive application of the height ordinance to the plans approved within the P-C Ordinance prevented completion of the ten stories in Phase 2. Indeed, the four-story building completed in 1967 itself exceeded the 50-foot limit by several feet.

After suffering numerous delays caused by obstructive acts of the City and its officials, Petitioner applied for an extension of the development schedule in August of 1976, three months before the schedule would expire. At all relevant times Section

18.68 of the City's Municipal Code provided that the Planning Commission could recommend an extension "for good cause shown by the property owner in writing."

In practice, the City had routinely granted such extensions upon application. Based upon a letter written on May 23, 1968 by the City Attorney, Petitioner reasonably expected that it could also obtain such an extension upon a showing of "good cause." But the Planning Commission refused to recommend, and upon appeal the City Council denied, any extension. This denial violated Petitioner's property rights, because Petitioner possessed "good cause" for an extension based not only upon economic circumstances that rendered completion of Phase 2 before October 31, 1976 infeasible, but also upon the dilatory and obstructive acts by the City that had prevented Petitioner from obtaining new building and use permits replacing identical but expired permits for Phase 2.

As a foundation for its claims for damages, Petitioner alleged, in addition to repeated investments in Phase 2 of the Project, the reasonableness of its expectations that Phase 2 could be completed as contemplated by the P-C Ordinance, and conduct by defendants that induced Petitioner to continue investing time and money in the Project.

The complaint cast these allegations in six claims for relief: First, inverse condemnation of Petitioner's property under the Fifth and Fourteenth Amendments; second, inverse condemnation under the California Constitution, Article 1 § 19; third, denial of equal protection and due process of law under the Fourteenth Amendment; fourth, denial of equal protection and due process of law under the California Constitution, Article 1 § 7; fifth, violations of sections 1981 and following of Title 42, U.S.C. (the "Civil Rights Act"), and sixth, declaratory relief.

The prayer for damages sought compensation for (a) Petitioner's historical investment in the property; (b) loss of time and profits, past and future, from the office building; (c) loss of future appreciation in the planned ten-story building. In the

alternative, the prayer sought equitable relief (an order allowing completion of the building) and interim damages for the City's taking.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. THIS COURT HAS RECENTLY DECIDED THAT PRECLUSION RULES DO NOT AUTOMATICALLY BAR A PLAINTIFF UNDER § 1983 FROM MAINTAINING FEDERAL CLAIMS THAT HE THEORETICALLY COULD HAVE RAISED, BUT ACTUALLY DID NOT RAISE, IN A PRIOR STATE-COURT PROCEEDING.

In *Haring v. Prosise*, 51 U.S.L.W. 4736 (decided June 13, 1983) this Court ruled that a plaintiff in an action under 42 U.S.C. § 1983 could present his Fourth Amendment claims to a federal court, even though he had entered a guilty plea and undergone criminal conviction in a state court without litigating those claims. This Court expressly rejected the contention that the plaintiff (Prosise) "should be barred from litigating an issue that was never raised, argued, or decided, simply because he had an opportunity to raise the issue in a previous proceeding." *Id.* at 4739.

The *Haring* opinion represents this Court's most recent decision on the applicability of preclusion rules under § 1983. The opinion was delivered by an unanimous Court. More importantly, the *Haring* decision was announced after the decision of the Ninth Circuit Court of Appeals in this case became final. The Ninth Circuit entered judgment on May 2, 1983 (App. B) and the mandate issued on June 2, 1983 (App. B).

Haring clearly marked one boundary for the application of claim and issue preclusion in a § 1983 action.* But other boundaries remain to be drawn by this Court.

* Petitioner recognizes the distinction between claim-preclusion (*res judicata*) and issue-preclusion (collateral estoppel). *See* Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 4471 (1981). The distinction is not critical in this case, because the courts below applied *res judicata*, the more comprehensive of the two rules.

Haring involved a voluntary plea of guilty in a state criminal prosecution followed by a conviction without trial. There this Court refused to presume that the criminal defendant had enjoyed the opportunity to raise his Fourth Amendment defenses, but had determined unilaterally not to do so.

Now this Court may turn to the important question presented here: the extent to which preclusion rules may apply in a § 1983 action after a state-court civil trial and final judgment in a proceeding for limited equitable relief only. This Petition depicts the natural topography for marking another boundry in the area of preclusion under § 1983.

II. THE CIRCUIT COURTS OF APPEALS HAVE ADOPTED CONFLICTING PRECLUSION RULES UNDER § 1983.

The courts below applied the more restrictive version of the rule on preclusion prevalent among the circuit courts of appeals; namely, that *res judicata* applies to all claims that were actually raised and all claims that might have been raised in an earlier state-court suit. The Ninth Circuit has adhered to that view of preclusion at least since *Scoggin v. Schrunk*, 522 F.2d 436 (9th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976).

As Justice White noted just last year, in dissenting from the denial of certiorari in *Castorr v. Brundage*, ____U.S.___, 103 S. Ct. 240 (1982), the courts of appeals remain divided on that issue:

> The issue of whether constitutional claims not actually litigated in earlier state proceedings are barred in a subsequent federal suit is of considerable importance to § 1983 litigants and has divided the federal courts of appeal. The First, Fifth, Eighth, Ninth, and Tenth Circuits, and now the Sixth circuit, have held that a § 1983 claimant is precluded by res judicata from relitigating not only the issues which were actually decided in the state proceeding, but also the issues which he might have presented. See *Lovely v. Laliberte*, 498 F.2d 1261 (CA 1), cert. denied, 419 U.S. 1038, 95 S.Ct. 526, 42 L.Ed.2d 316 (1974); *Jennings v. Caddo Parish School Bd.*, 531 F.2d 1331 (CA 5 1976);

Robbins v. Dist. Court, 592 F.2d 1015 (CA 8 1979); *Scoggin v. Schrunk*, 522 F.2d 436 (CA 9 1975), cert. denied, 423 U.S. 1066, 96 S.Ct. 807, 46 L.Ed.2d 657 (1976); *Spence v. Latting*, 512 F.2d 93 (CA 10), cert. denied, 423 U.S. 896, 96 S.Ct. 198, 46 L.Ed.2d 129 (1975). The Second and Third Circuits hold that a litigant is not precluded from asserting later such claims in federal court. See *Lombard v. Board of Ed. of New York City*, 502 F.2d 631 (CA 2 1974), cert. denied, 420 U.S. 976, 95 S.Ct. 1400, 43 L.Ed.2d 656 (1975); *New Jersey Ed. Ass'n. v. Burke*, 579 F.2d 764 (CA 3), cert. denied, 439 U.S. 894, 99 S.Ct. 252, 58 L.Ed.2d 239 (1978). This conflict -- which has been recognized by petitioner, by respondent, by the court below, and even by this Court, *Allen v. McCurry*, 449 U.S. 90, 97, n. 10, 101 S.Ct. 411, 416, n. 10, 66 L.Ed.2d 308 (1980) -- should now be resolved. I would grant certiorari.

While *Haring* rejected the Ninth Circuit's view in the context of a criminal plea of guilty without trial, as to other kinds of prior state-court proceedings, not only does this Court's position remain unknown, but the division among the circuit courts of appeals persists and threatens to grow deeper.

Indeed, the courts of appeals may well perceive conflicting signals emanating from this Court. To begin with, this Court has stated repeatedly that it has yet to address the validity of the less restrictive rule on preclusion; that is, that a plaintiff under §1983 may relitigate in federal court all issues except those actually raised and decided in the earlier state-court proceeding. This is apparently the view of the Second and Third Circuits. *E.g., Williams v. Codd*, 459 F.Supp. 804, 812 (S.D.N.Y. 1978) ("The doctrine of *res judicata* does apply to civil rights cases in general, of course, but in a somewhat relaxed form.")

In *Allen v. McCurry*, 449 U.S. 90 (1980), this Court discussed generally the rules on claim and issue preclusion under § 1983, but without ever ruling on the Second and Third Circuits' interpretation:

> A very few courts have suggested that the normal rules of claim preclusion should not apply in §1983 suits in one

> peculiar circumstance: Where a §1983 plaintiff seeks to litigate in federal court a federal issue which he would have raised but did not raise in an earlier state-court suit against the same adverse party. *Graves v. Olgiati*, 550 F. 2d 1327 (CA2 1977). *Lombard v. Board of Ed. of New York City*, 502 F.2d 631 (CA2 1974); *Mack v. Florida Bd. of Dentistry*, 430 F.2d 862 (CA5 1970). These cases present a narrow question not now before us and we intimate no view as to whether they were correctly decided.

449 U.S. 90, 97 n. 10.

Again, in *Haring*, this Court expressly refrained from addressing that question:

> Other federal courts have concluded, however, that civil rights plaintiffs are not barred from litigating issues that could have been raised in prior proceedings in state court on a different cause of action. *See e.g., New Jersey Ed. Assn. v. Burke*, 579 F.2d 764, 772-774 (CA3 1978); *Lombard v. Board of Education*, 502 F.2d 631 635-637 (CA2 1974). Since no motion to suppress evidence on Fourth Amendment grounds was ever raised at the state-court proceedings, this case does not present questions as to the scope of collateral estoppel with respect to particular issues that were litigated and decided at a criminal trial in state court. As we did in *Allen v. McCurry*, 449 U.S. 90, 93 n. 2 (1980), we now leave those questions to another day.

51 U.S.L.W. 4736, 4737 n. 2.

That precise question still remains open. In addition, the direction of this Court's decisions on preclusion under §1983 remains uncertain. *Haring* itself points towards the need to limit the range of preclusion rules in actions under § 1983. *Allen v. McCurry*, in contrast, pointed towards broadening the applicability of those same rules; for there this Court stressed that nothing in the legislative history and purpose of §1983 made preclusion rules generally inapplicable. 449 U.S. 90, 96-97, 104-5.

The lower federal courts have taken *Allen* as encouragement to apply those rules liberally. Even a district court within the

Second Circuit interpreted *Allen* as an invitation to apply *res judicata* freely to federal constitutional claims, whether or not brought under § 1983:

> According to *Monroe v. Pape*, Congress intended in § 1983 to provide a supplementary remedy where state law and process did not allow full and fair litigation of a constitutional claim. But the court in *Allen* recognized that this was in accord with the normal res judicata and collateral estoppel rules, which require a full and fair opportunity to litigate the claim or issue in the first action as a predicate to a bar in the second action.
>
> Thus, the Supreme Court in *Allen* has taken the strongest possible view in favor of full application of res judicata and collateral esoppel rules in §1983 cases. The normal res judicata rule includes a bar against assertion in a second action of an issue which could have been litigated in the first action, but was not. The view that the latter rule does not apply in §1983 cases is wholly inconsistent with the teachings of *Allen*.[1]
>
> As noted earlier, the present case is not brought under § 1983, but directly under the Fifth and Fourteenth Amendments. The Second Circuit in *Lombard* left open the question of whether a federal court action brought directly under the Constitution would be barred by a prior claim could have been litigated but was not. 502 F.2d at 637. In view of *Allen v. McCurry*, it seems clear that, at the very least, one must read the *Lombard* holding narrowly, and should not expand it beyond its precise facts. Thus, the answer to the question left open in *Lombard* is that res judicata should apply. The result in the present case is that plaintiff's claim is barred.

Sachetti v. Blair 536 F.Supp. 636, 640-41 (S.D.N.Y. 1982). Indeed, in a footnote the *Sachetti* court portrayed the Second Circuit's view as isolated and possibly incorrect after *Allen*. *See also, Harrington v. Inhabitants of Town of Garland, Me.*, 551 F.Supp. 1371, 1373-75 (D.Me. 1982) (noting the uncertainty created by the question left open in *Allen v. McCurry*).

Nor does this Court's opinion in *Kremer v. Chemical Construction Corporation*, 456 U.S. 461, 102 S. Ct. 1883 (1982),

help remove the false impression that preclusion rules are settled in §1983 actions. *Kremer*, of course, was a Title VII case. *Kremer* rested upon the legislative history of 42 U.S.C. §§2000e and following and their relation to 28 U.S.C. § 1738. Yet there this Court held that a Title VII plaintiff would be precluded from suing in federal court if the earlier state proceedings did "no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause" and the plaintiff had enjoyed a "full and fair opportunity to litigate" his claim of employment discrimination. 456 U.S. 461, 102, S. Ct. 1883, 1897.

If receiving a minimum of due process sufficed to trigger preclusion under Title VII, then why would not a very small measure of due process produce a similar result under §1983? True, the *Kremer* opinion suggested, in *dictum*, that preclusion under §1983 might apply under stricter constitutional requirements:

> Our finding that Title VII did not create an exception to §1738 is strongly suggested if not compelled by our recent decision in *Allen v. McCurry*, *supra*, that preclusion rules apply in §1983 actions and may bar federal courts from freshly deciding constitutional claims previously litigated in state courts. Indeed, there is more in §1983 to suggest an implied repeal of §1738 than we have found in Title VII.

456 U.S. 461, 476.

But the holding of *Kremer* reflected this Court's apparent movement toward expanding the scope of preclusion rules.

Repeated, indeed universal, concern over the federal caseload gives the lower federal courts a practical reason to read *Allen* and *Kremer* in that manner. *But compare Consolidated Foods Corporation v. Unger*, ___U.S.__, 102 S. Ct. 2288 (1982) (Blackmun, J., concurring) (concern that *Kremer* will not serve Congress' purpose in enacting Title VII and may even encourage claimants *not* to seek redress first in state agencies and courts).

Now *Haring* has made it evident that this Court does not intend to sanction any broad, virtually automatic rule of preclusion in § 1983 actions. Therefore, this Court should now address the correctness of the Ninth Circuit's view, as applied in this case, that an earlier state-court suit for equitable relief bars a subsequent action for damages under § 1983, simply because the plaintiff, 'could have' sought damages in the state court, notwithstanding the constitutional inadequacy of the remedy made available by the state court.

III. PETITIONER DID NOT ENJOY A "FULL AND FAIR OPPORTUNITY" TO MAINTAIN ITS CONSTITUTIONAL CLAIMS FOR DAMAGES IN STATE COURT BECAUSE THE CALIFORNIA COURTS REQUIRED INITIAL RESORT TO EQUITABLE REMEDIES AND ULTIMATELY ELIMINATED ANY MONETARY REMEDY ALTOGETHER.

In this case Petitioner admittedly went to trial in a California court in the Mandamus (to obtain extension of the development schedule and permits) and then appealed unsuccessfully. On this ground, the courts below concluded that, Petitioner either fully litigated its constitutional claims in the Mandamus or at least had an opportunity to do so but declined.

Unfortunately, this facile conclusion ignores historical reality—in particular, the evolution of California law during the period from 1977 through 1981 when Mandamus was pending.

That hard reality, already familiar to this Court from the cases cited below, brings Petitioner now within the established exceptions to preclusion under § 1983.

The two chief exceptions are stated in the *Haring* opinion; and both operate in this case in tandem:

> Section 28 U. S. C. sec. 1738 generally requires "federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so.; *Allen v. McCurry, supra,*

at 96.[6] In federal actions, including sec. 1983 actions, a state-court judgment will not be given collateral estoppel effect, however, where "the party against who an earlier court decision is asserted did not have a full and fair opportunity to litigate the claim or issue decided by the first court." *Id.*, at 101[7] Moreover, additional exceptions to collateral estoppel may be warranted in sec. 1983 actions in light of the "understanding of sec. 1983" that "the federal courts could step in where the state courts were unable or unwilling to protect federal rights." *Id.*, at 101. Cf. *id.*, at 95, n. 7; *Board of Regents v. Tomanio*, 446 U.S. 478, 485-486 (1980) (42 U.S.C. sec. 1988 authorizes federal courts, in an action under sec. 1983, to disregard an otherwise applicable state rule of law if the state law is inconsistent with the federal policy underlying sec. 1983).

51 U.S.L.W. 4736, 4738.

In this case Petitioner could not have effectively litigated its federal constitutional claims for damages in state court, precisely because the California courts in 1977 favored initial resort to equitable remedies (*i.e.* mandamus or declaratory relief) and by 1979 the California Supreme Court had expressly eliminated the monetary remedy for a regulatory taking under the Fifth Amendment. *See Agins v. City of Tiburon*, 24 Cal.3d 266, 598 P.2d 25, 157 Cal.Rptr. 372 (1979), *aff'd.*, 447 U.S. 255 (1980) (challenged zoning ordinance, held constitutional on its face; no opinion expressed on requirement of a monetary remedy under the Fifth Amendment).

The historical antecedents of the California high court's opinion in *Agins* are summarized in the opinion itself. 24 Cal. 3d 266, 273-77, 157 Cal.Rptr. 372, 375-77. In brief, the California court in 1975 began by expressing a preference for equitable suits in disputes over land-use regulations (zoning ordinances and general plans, typically). *HFH, Ltd. v. Superior Court*, 15 Cal.3d 508, 542 P.2d 237, 125 Cal.Rptr. 365, *cert. denied* 425 U.S. 904 (1976). At the same time the *HFH* court restricted the scope of regulatory 'takings' to those cases in which the challenged regulation deprived the owner of virtu-

ally all reasonable use of his land. *HFH, Ltd., supra,* at 15 Cal. 3d 518 n. 16. During the years succeeding that decision, the California appellate courts almost invariably ruled against the landowner in actions for inverse-condemnation damages. *E.g., Brown v. City of Fremont,* 75 Cal.App.3d 141, 142 Cal.Rptr. 575 (1976) (cause of action for inverse condemnation stated where City's rezoning deprived owner of any economically viable use and may have served as an alternative to public acquisition for park use). Finally, in 1979 the California Supreme Court in *Agins* not only stated that the California courts may not award monetary damages under the Fifth Amendment in land-regulation cases, but also expressly disapproved *Eldridge* as inconsistent with that radical rule. 24 Cal.App.3d 266, 273, 157 Cal.Rptr. 372, 375, 598 P.2d 25.

It was during that epoch that Petitioner prosecuted the Mandamus in the California courts. The Mandamus sought only equitable relief – essentially an order requiring the City to extend the development schedule and issue replacement use and building permits in order to complete the ten-story building originally approved. Petitioner argued that it held a "vested right" to complete the building, because such an allegation was required under California law to obtain *de novo* review of an agency's decision through mandamus. The determination on "vested right" in the Mandamus affected a preliminary procedural matter, not any substantive issue necessary to the decision. Cal. Code of Civ. Proc. §§1085, 1094.5; *Strumsky v. San Diego County Employees Retirement Association,* 11 Cal.3d 28, 520 P.2d 29, 112 Cal. Rptr. 805 (*de novo* review "under independent judgment" test applies in proceeding under C.C.P. § 1094.5 for administrative mandamus where a fundamental, vested right stands at issue). Petitioner sought no money in the Mandamus. Nor did Petitioner attempt to establish those facts requisite to a cause of action for inverse condemnation: the lack of any remaining, economically viable use for the property taken, acquisitory intent on the part of the City, the existence and extent of injury to the real property.

See generally, Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) and *Kaiser-Aetna v. U.S.*, 444 U.S. 164 (1979).

In light of this disquieting chronicle of California land-use law and Petitioner's enforced compliance with the procedural and substantive aspects of that law, this Court should conclude that the exceptions noted in *Haring* do cover this case. For if those exceptions do not control here, then the strong federal policies behind §1983 may have lost their original force and direction. The commentators on §1983 have observed that the scope of the "full and fair opportunity" exception remains somewhat "ambiguous" still, and so this Court has yet another reason to grant this Petition. Wright, Miller & Cooper, (1981) Federal Practice and Procedure: Juristicton § 4471, at p. 708 (1981).

Clearly this is a case in which the California courts have refused to afford Petitioner the right to seek monetary damages under the Fifth and Fourteenth Amendments, while the lower federal courts, in a subsequent § 1983 action, have effectively blessed the dereliction of the state courts.

The decision of the California Supreme Court in *Agins, supra*, does not comport with the requirements of the Fifth Amendment regarding the availability of a monetary remedy. In his dissenting opinion in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 101 S. Ct. 1287, Justice Brennan reasoned the Fifth Amendment mandates the availability of monetary damages for a taking. Justice Rehnquist would have agreed with that view in the dissenting opinion. 450 U.S. 621, 636 (Rehnquist, J., concurring in the dismissal for lack of a final judgment below). It is now generally recognized that a majority of this Court probably disagrees with the California high court's view of remedies under the Fifth Amendment.

Ironically, the Ninth Circuit stands among the first of the courts of appeals to read the opinions in *San Diego Gas &*

Electric as disapproval of *Agins*. In reversing a summary judgment against a landowner suing a city and water district in California for damages under § 1983, the Ninth Circuit refused to follow *Agins* on the question of remedy because ". . . the present vitality of this aspect of Agins has . . . been substantially undercut by Justice Brennan's dissenting opinion in San Diego Gas & Electric Co. v. City of San Diego, . . ." *Martino v. Santa Clara Valley Water District*, 83 Daily Journal D.A.R. 1067, (April 14, 1983) (No. 81-4578).

The landowner in *Martino* had sought no equitable relief, neither mandamus nor declaratory relief. Therefore the Ninth Circuit might have affirmed the summary judgment on the ground that the landowner had prayed only for damages, and California law on inverse condemnation prohibited an award of damages. The *Martino* court chose to follow this Court's constitutional rulings instead, reasoning:

> Even if we were persuaded by the dictum in *Agins* to hold that the Martinos could not recover damages for inverse condemnation, summary judgment would be improper insofar as it relates to the Martinos' claim under the Federal Civil Rights Act, 42 U.S.C. sec. 1983, 1985 and 1986 . . . are currently in a state of evolving definition and uncertainty" (*See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 246, 256 (1981)), an action for damages under section 1983 for the overregulation of land was recognized by the U.S. Supreme Court in *Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979). The district court improperly denied the Martinos an opportunity to try to prove such a claim.

Id. at 1069.

Because California law governing the Mandamus meant that the state courts were either unable or unwilling to protect Petitioner's constitutional right to seek damages, and more likely both, the courts below should not have dismissed Petitioner's § 1983 action on the ground of *res judicata*. *Haring v. Prosise*, *supra*, at 4738.

IV. SINCE THE FINAL JUDGMENT IN THE MANDAMUS, THIS COURT HAS IMPLICITLY DISAPPROVED THE CALIFORNIA HIGH COURT'S OPINION IN *AGINS* ON THE ISSUE OF DAMAGES FOR INVERSE CONDEMNATION, AND THIS CHANGE IN CONTROLLING LAW MAKES PRECLUSION INAPPLICABLE TO PETITIONER'S ACTION UNDER § 1983.

Having recounted the rise and fall of the California rule in *Agins*, Petitioner now submits that those drastic changes in governing constitutional law afford yet another exception to the preclusion rules.

This Court explained this exception in its *Haring* opinion:

> We have recognized various other conditions that must also be satisfied before giving preclusive effect to a state-court judgment. See generally *Montana v. United States*, 440 U.S. 147 (1979). For example, collateral estoppel effect is not appropriate when "controlling facts or legal principles have changed significantly since the state-court judgment," *id.*, at 155, or when "special circumstances warrant an excention [sic] to the normal rules of preclusion," *Montana v. United States, supra*, at 155; see, *e.g.*, *Porter and Dietsche, Inc. v. FTC*, 605 F. 2d 294, 300 (CA7 1979); cf. *Montana v. United States, supra*, at 163 (preclusive effect to a state-court judgment may be inappropriate when the sec. 1983 claimant has not " 'freely and without reservation submit(ted) his federal claims for decision by the state courts . . . and ha(d) them decided there . . .' ") (quoting *England v. Medical Examiners*, 375 U.S. 411, 419 (1964)).

51 U.S.L.W. 4736, 4738 n.7

Not until after the final judgment of the California Court of Appeal in the Mandamus did Petitioner become free of the restriction on monetary damages, and an unconstitutional restriction at that, existing under California law. This Court announced its decision in *San Diego Gas & Electric Co., supra*, on March 24, 1981, thirteen days after the decision by the California Court of Appeal. Petitioner commenced its action for damages under § 1983 on December 3, 1981.

Unless the judgment below is reversed, Petitioner will never have an opportunity to present its claim for damages to any court disposed to recognize and to rule fairly on such a claim.

V. THE POLICY BEHIND § 1983, TO ASSURE THE FEDERAL FORUM FOR VINDICATION OF CONSTITUTIONAL RIGHTS, WILL BEST BE SERVED BY THIS COURT'S ISSUING ITS WRIT.

This Court has repeatedly recognized the purposes served by § 1983. In essence, the statute embodies a policy that the federal courts remain available to litigants seeking redress for violation of their constitutional rights. That policy takes on compelling force in those cases where the state courts have proven deficient in protecting such rights. *Haring v. Prosise*, 51 U.S.L.W. 4736, 4741; *accord*, *Allen v. McCurry*, 449 U.S. 90, 100-1 (1980). As this Court succinctly explained in *Allen*:

> To the extent that it did intend to change the balance of power over federal questions between the state and federal courts, the 42d Congress was acting in a way thoroughly consistent with the doctrines of preclusion. In reviewing the legislative history of § 1983 in *Monroe v. Pape*, *supra*, the Court inferred that Congress had intended a federal remedy in three circumstances: where state substantive law was facially unconstitutional, where state procedural law was inadequate to allow full litigation of a constitutional claim, and where state procedural law, though adequate in theory, was inadequate in practice. 365 U.S., at 173-174. In short, the federal courts could step in where the state courts were unable or unwilling to protect federal rights. *Id.*, at 176. This understanding of § 1983 might well support an exception to res judicata and collateral estoppel where state law did not provide fair procedures for the litigation of constitutional claims, or where a state court failed to even acknowledge the existence of the constitutional principle on which a litigant based his claim.

449 U.S. 100, 101.

Here the California courts in practice ignored, and ultimately disavowed, Petitioner's right to seek monetary damages for an alleged taking of property under the Fifth Amendment. Nothing in *Allen v. McCurry* or in any of this Court's other decisions on the preclusion rules authorizes the decision by the Ninth Circuit here.

Other policies, Petitioner recognizes, impinge upon the question of preclusion under § 1983. There are, for example, considerations of comity and federalism and the express mandate of full faith-and-credit for state-court judgments under 28 U.S.C. § 1738. In addition, limited federal judicial resources may cause this Court to incline towards giving greater scope to preclusion rules.

Reconciling all of these competing interests does not present an easy task. *See generally*, Note, "Res Judicata and Section 1983: The Effect of State Court Judgments on Federal Civil Rights Action," 27 *UCLA L. Rev.* 177 (1977). In the final analysis, the creation of a universal rule on preclusion under § 1983 may not prove a manageable or desirable enterprise.

Yet more modest, but extremely important, goals lie within this Court's reach. The division among the circuit courts of appeals on preclusion rules can be healed definitively. In addition, this Court can clearly announce in this case that a civil action for damages under § 1983 can be maintained after an earlier state-court suit that confined the plaintiff to a single, constitutionally inadequate, equitable remedy. Finally, this Court may rule that, in land-regulation cases such as this where the need for finality is not great, where in reality the land remains frozen and the City adamant in its denial of the owner's rights, the doctrine of *res judicata* will display a narrower sweep.

Cf. Castorr v. Brundage, U.S. , 103 S.Ct. 240, 241 (Stevens, J., concurring in denial of certiorari).

This court should issue its writ in this case as one that sharply poses an important set of related questions under § 1983 and the Fifth and Fourteenth Amendments.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,
On July 31, 1983

SIMS & WIDMAN

/s/ Jeffrey P. Widman
JEFFREY P. WIDMAN
84 W. Santa Clara St.
San Jose, CA 95115
Telephone: (408) 998-3400

Attorneys for Petitioner

CERTIFICATE OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF SANTA CLARA)

Jeffrey P. Widman, being first duly sworn upon his oath, deposes and says that he is a member of the Bar of this Court and one of the counsel of record for Petitioner in this cause; that on this 1st day of August, 1983, he mailed three copies of Petitioner's Petition for a Writ of Certiorari in this cause by depositing same in the United States mail, first-class postage prepaid, to:

Diane M. Lee
City Attorney
City of Palo Alto
250 Hamilton Ave.
Palo Alto, CA 94301

Fred Caploe
Williams & Caploe
1060 Grant St.,
Suite 201
P.O. Box 698
Benicia, CA 94510

and that he also mailed forty copies of Petitioners' Petition for a Writ of Certiorari to the Clerk of this Court, first-class postage prepaid, all in compliance with Supreme Court Rule 28.

/s/ Jeffrey P. Widman
JEFFREY P. WIDMAN

SUBSCRIBED AND SWORN to before me this 31st day of July, 1983.

Witness my hand and official seal.

/s/ A.B. Drexler
A.B. DREXLER
NOTARY PUBLIC

My commission expires 7-15-86

APPENDICES

TABLE OF CONTENTS

APPENDIX A

(1) Complaint for Inverse Condemnation, Deprivation of Constitutional Rights and Violation of the Federal Civil Rights Act and Declaratory Relief in the United States District Court for the Northern District Court of California filed on December 3, 1981.

(2) Order Granting Motion to Dismiss of the United States District Court for the Northern District of California filed on June 4, 1982.

(3) Judgment of the United States District Court for the Northern District of California filed on June 4, 1982.

JEFFREY P. WIDMAN
ANDREW L. FABER
BERLINER, COHEN & BIAGINI
99 Almaden Blvd., Suite 400
San Jose, CA 95113
Telephone: (408) 286-5800

ROBERT E. CARTWRIGHT
CARTWRIGHT, SUCHERMAN, SLOBODIN, & FOWLER, INC.
160 Sansome Street, Suite 900
San Francisco, CA 94306
Telephone: (415) 433-0440

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

COURT HOUSE PLAZA COMPANY, a limited partnership, v. Plaintiff, THE CITY OF PALO ALTO, a municipal corporation, STANLEY R. NORTON, BYRON D. SHER, FRED S. EYERLY, ROY L. CLAY, KIRKE W. COMSTOCK, SCOTT T. CAREY, JOHN J. BERWALD, ANNE R. WITHERSPOON, JOHN V. BEARS, Councilmen, PETER R. CARPENTER, MARY R. GORDON, WILLIAM E. GREEN, JAY W. MITCHELL, EMILY M. RENZEL ANNE STEINBERG, Planning Commissioners, STAN J. NOWICKI, Chief Building Inspector, JAMES O. GLANVILLE, Zoning Administrator, NAPTHALI H. KNOX, Director of Planning and Community Environment, ROBERT K. BOOTH, JR., City Attorney and LOUIS B. GREEN, Assistant City Attorney, Defendants.	No. C-81-4537 SC COMPLAINT FOR INVERSE CONDEMNATION, DEPRIVATION OF CONSTITUTIONAL RIGHTS AND VIOLATION OF THE FEDERAL CIVIL RIGHTS ACT AND DECLARATORY RELIEF [Jury Trial Demanded]

FIRST CLAIM FOR RELIEF

[Inverse Condemnation – United States Constitution]

[Jurisdiction and Venue]

1. This Court has jurisdiction under Section 1331 of Title 28 of the United States Code, because this action arises under the Fifth and Fourteenth Amendments to the Constitution of the United States and, more specifically, those clauses of those Amendments requiring the payment of just compensation to the owner of property taken by government for public use and prohibiting the deprivation of rights without due process of law and the denial of equal protection under the laws.
2. This Court has jurisdiction also under Section 1343 of Title 28 of the United States Code, because this action is brought under Sections 1981 and following of Title 42 of the United States Code (the Civil Rights Act) to redress the deprivation, under color of state law, of Plaintiff's rights, privileges, and immunities secured by the Constitution of the United States and by the Act.
3. To the extent that state law may authorize any claim for relief stated herein, this Court has pendent jurisdiction of such state claims because they arise from the same set of facts as the federal claims stated in this Complaint.
4. Plaintiff, COURT HOUSE PLAZA COMPANY, is a limited partnership formed and existing under the California Limited Partnership Act (Corporations Code §§15500 *et seq.*) Plaintiff does business under the name of COURT HOUSE PLAZA COMPANY and has complied with the provisions of California law (Business and Professions Code §§17910 *et seq.*) for the filing and publication of a certificate stating such fictitious business name. Plaintiff is the successor-in-interest to California Lands Building Company, a California general partnership, the former owner of the property in question here until about October of 1971.

5. Plaintiff's principal place of business, and the property in question are located within, and the acts of Defendants described in this Complaint, all occurred within, the jurisdictional boundaries of the District Court for the Northern District of California. Venue is proper in this Court for the prosecution of this action.

[Parties to this Action]

6. Plaintiff is the fee owner of real property located at 260 Sheridan Avenue, City of Palo Alto, County of Santa Clara, State of California.

7. Defendant, THE CITY OF PALO ALTO ("the CITY"), is now and at all times pertinent to this action was, a municipal corporation organized and existing under the laws of the State of California as a charter city and located in the County of Santa Clara, State of California.

8. Defendents STANLEY R. NORTON, BRYON D. SHER, FRED S. EYERLY, ROY L. CLAY, KIRKE W. COMSTOCK, SCOTT T. CAREY, JOHN T. BERWALD, ANNE R. WITHERSPOON and JOHN V. BEAHRS were, on and before December 6, 1976, members of the City Council of the CITY.

Defendents PETER H. CARPENTER, MARY GORDON, WILLIAM E. GREEN, JAY W. MITCHELL, EMILY M. RENZEL and ANNE STEINBERG were, on and before December 6, 1976, members of the Planning Commission of the CITY.

Defendants STANLEY J. NOWICKI, JAMES O. GLANVILLE, NAPHTALI H. KNOX, ROBERT K. BOOTH, JR., and LOUIS B. GREEN were, on or before December 6, 1976, respectively, the Chief Building Inspector, the Zoning Administrator, the Director of Planning and Community Environment, the City Attorney, and the Assistant City Attorney of the CITY.

9. At all times pertinent to this action, Defendants individually and collectively, acted in concert to cause Plaintiff's injury

as described in this Complaint; and the individual Defendants served as the agents and/or employees of Defendant CITY and of each other and at all times acted within the scope of such agency and employment.

[History of the Project: Acquisition of Vested Rights]

10. The CITY adopted Ordinance No. 2224 on December 28, 1964 (the "P-C Ordinance"). The P-C Ordinance placed Plaintiff's property in a "P-C" zone; that is, a zone for professional and commercial office use. The P-C Ordinance also approved (by incorporation) Plaintiff's development plans for ten-story office building; and these plans consisted of detailed drawings showing the location, elevation, and floor plan of the building, the related parking garage, and other details of the site development (the "Project").

11. The P-C Ordinance contained certain conditions:

(a) "Building location, dimensions, heights and other improvements shall be substantially as indicated on the approved Development Plan."

(b) Off-street parking space shall be provided, the number of spaces to be at the ratio of one for each 144 square feet of floor area in the ground floors and one parking space for each 288 square feet of floor space in the upper floors.

(c) The ten-story building shall be built according to a development schedule providing that, in Phase 1, "start of construction of the four-story office building" and the "parking garage" shall be "within two years of Council approval" and, in Phase 2, "start of construction of the fifth to and including the tenth story" and "additional levels of the parking garage" shall be "by October 31, 1976."

The development schedule contained in the P-C Ordinance rested upon an understanding between Plaintiff and City officials that the phasing of the Project would enable

Plaintiff to complete the Project when the demand for office space in the CITY made completion economically feasible.

12. Soon after adoption of the P-C Ordinance Plaintiff prepared architectural plans for the entire ten-story building. On June 14, 1966, the CITY issued a building permit for Phase 1. On January 17, 1966, the CITY issued a use permit for Phase 1. In reliance upon these permits and with the guidance of its architectural plans for the ten-story building, Plaintiff commenced construction of Phase 1, within the two-year period required under the development schedule of the P-C Ordinance, and completed construction in about August of 1967.

13. The first four stories of the building completed in Phase 1 incorporated structural elements designed to support the remaining six stories in Phase 2. Among the structural elements, costing over $450,000, were the following:
    (a) A foundation capable in sustaining all ten floors;
    (b) Structural steel of sufficient strength to support the remaining six floors;
    (c) Heating and cooling equipment placed in the basement instead of upon the roof, in order to permit construction of the remaining six floors without interrupting service to the first four floors;
    (d) Two additional elevator shafts to accommodate elevators for the remaining six floors;
    (e) An interior smokeproof tower for fire safety purposes, not necessary in a four-story building;
    (f) Extra electrical, water and sewage capacity permitting hook-up of facilities on the remaining six floors.

14. In so completing Phase 1 and thereby commencing actual construction of Phase 2, Plaintiff acquired a vested right to complete Phase 2 under regulations in effect on the date that the P-C Ordinance was adopted. Plaintiff reasonably expected that it might complete Phase 2 under such regulations based upon the conduct of Defendants in

issuing building and use permits for commencement of the Project; and the Plaintiff's investment in the Project in 1966 and succeeding years resulted from that reasonable expectation.

[The Parking Problem]

15. Because the parking garage contemplated by the P-C Ordinance would have interfered with the CITY's plan for realignment of Page Mill Road, the CITY did not require Plaintiff to begin construction of the garage within the two years provided in the development schedule. On December 13, 1965 the CITY adopted Resolution No. 3860 requiring Plaintiff to provide 107 off-street parking spaces instead of the garage. The CITY thereby acknowledged its responsibility for impeding Plaintiff's construction of the parking garage and indicated officially its willingness to cooperate with Plaintiff in resolving the parking problem.

16. Thereafter CITY engaged in a course of conduct which effectively aggravated the parking problem, prevented its resolution, thwarted Plaintiff in its efforts to satsify the condition of the P-C Ordinance regarding parking spaces. The CITY's course of conduct included, among others, the following acts:

    (a) The CITY failed to resolve with the County of Santa Clara the design of the Page Mill Road realignment.

    (b) On December 11, 1967, the CITY adopted Resolution No. 4055 extending time for the commencement of construction of the parking garage by one year. On May 6, 1968 the CITY adopted Resolution No. 4113, rescinding Resolutions Nos. 3860 and 4055, substituting 107 attendant parking spaces on the surface in place of a parking garage, and allowing until October 31, 1976, for Plaintiff to commence construction of the parking garage.

(c) By agreement with the County of Santa Clara, the CITY consented to the County's acquiring, under a final order of condemnation entered on August 21, 1970, a portion of the land Plaintiff intended to use for construction of the parking garage, making its construction impossible.

(d) In connection with the foregoing condemnation, the CITY sold the County, and the County conveyed to Plaintiff as partial compensation, a small piece of land supposedly usable for the parking garage, but known to the CITY not to be usable under CITY's own requirements for design and construction.

(e) On March 31, 1975, the CITY resolved to acquire six parcels of land (the "Power parcels") for eventual development by the CITY for low-and moderate-income housing. At the time of this Resolution the CITY knew that Plaintiff had once invested funds in acquiring an option to purchase, and later in purchasing the Power parcels as a means of resolving the parking problem. Although no longer the owner after 1973, Plaintiff remained interested in using the Power parcels for parking for the project.

By these and other acts the CITY defeated Plaintiff's reasonable expectation that the CITY would with Plaintiff cooperate to satisfy the parking requirements for the Project before October 31, 1976.

[City's Dilatory and Arbitrary Administrative Acts]

17. In the Fall of 1968 Plaintiff completed construction drawings for Phase 2. The demand for office space then justified completion of Phase 2. In October of 1969 Plaintiff arranged financing for construction, directed its general contractor to commence the placement of construction subcontracts for the remainder of Phase 2, and particularly for structural steel and elevators for the six-story addition.

18. Plaintiff applied for a building permit on December 1, 1969. Instead of issuing a building permit promptly according to the regulations fixed by the P-C Ordinance, Defendants arbitrarily insisted that the smokeproof tower shown in the construction plans did not comply with the CITY's Building Code as amended after the P-C Ordinance. This dispute between Plaintiff and Defendants was not resolved until after the Assistant City Attorney ruled that Plaintiff had acquired vested rights in a ten-story office building, to be completed with an interior smokeshaft and without a fire sprinkler system, under the P-C Ordinance. The CITY finally issued the building permit on February 16, 1970.

19. Plaintiff applied for a use permit on February 13, 1970. Again Defendants arbitrarily objected to this application on the ground that the ten-story building, when completed, would be fourteen feet higher than the building shown in the drawings incorporated into the P-C Ordinance, even though defendants knew that the P-C Ordinance required building heights to be only "substantially as indicated on the approved Development Plan." The fourteen-foot height difference derived from the need for more space between the floors to accommodate heating and ventilation equipment. The first four floors built in Phase 1 had already included the extra spacing. Because CITY's Zoning Administrator objected to the difference in height, Plaintiff was required to request the CITY's Planning Commission to overrule the Zoning Administrator. On March 30, 1970 the City Council approved the Planning Commission's favorable ruling and issued the use permit, thereby ruling officially that the fourteen-foot height difference substantially complied with the P-C Ordinance.

20. While the CITY so delayed in issuing building and use permits to Plaintiff for the completion of Phase 2, the CITY also approved, on September 22, 1969, the nearby Palo Alto Square Project consisting of two ten-story office

towers competing directly with Plaintiff's Project. The Palo Alto Square Project created a surplus of professional and commercial office space in the vicinity and so rendered the completion of Phase 2 by Plaintiff not viable economically for several years under then-prevailing business and financial conditions.

21. Notwithstanding its own financial difficulties and the saturated market for office space, Plaintiff again applied for a use permit to complete Phase 2, following the expiration of the use permit issued on February 13, 1970. Plaintiff's new application was filed on February 27, 1973 and requested a use permit identical to the one issued in 1970. Despite the fact that the City Council had already declared officially that the fourteen-foot height difference complied substantially with the P-C Ordinance, the CITY's Zoning Administrator indicated his intent to deny the new application because of that difference. In the face of this arbitrary objection, Plaintiff withdrew this application on March 30, 1973.

22. In September of 1973 the CITY adopted an interim Ordinance No. 2745 limiting the height of new structures to fifty feet. The CITY incorporated this fifty-foot height limit into its new comprehensive plan in 1976.

23. In late 1975 the market for professional and commercial office space finally improved. The competitive Palo Alto Square Project was then almost completely leased. The renewed demand for office space and the availability of construction financing combined to render the completion of Phase 2 of the Project economically feasible once again.

24. In September of 1975 Plaintiff renewed discussions with Defendants regarding the completion of Phase 2. In response, Defendants resumed a course of conduct intended to delay Plaintiff, prevent completion of Phase 2, deprive Plaintiff of its vested rights, and to frustrate Plaintiff's reasonable investment-backed expectation

that it could complete the Project under the P-C Ordinance and the regulations in effect when the P-C Ordinance was adopted. Among the acts comprising such course of conduct were the following:

(a) After Plaintiff applied on June 30, 1976 for a change in the P-C zone to resolve the parking problem, the CITY's Zoning Administrator unreasonably objected to such application on the ground that it included land not owned by Plaintiff and for which Plaintiff requested contingent P-C zoning. Consequently, Plaintiff acquired the described land on September 11, 1976. Notwithstanding Plaintiff's expenditures of time, money, and personal efforts the zone-change application was never finally processed by the CITY before October 31, 1976, the end of the development schedule under the P-C Ordinance.

(b) In the face of objections to its zone-change application, Plaintiff applied for a three-year extension of the development schedule on the suggestion of Zoning Administrator. The Planning Commission denied this extension on August 25, 1976, despite the fact that Section 18.68 of the CITY's Municipal Code provides that an extension of a development schedule may be recommended by the Planning Commission "for good cause shown by the property owner in writing." Plaintiff appealed the denial to the City Council, and the Council placed the appeal on its agenda. On the advice by the Mayor of the CITY and other council-members that the appeal would prove too controversial, Plaintiff withdrew the appeal on September 11, 1976.

(c) On August 27, 1976 Plaintiff applies for another use permit for the same ten-story building for which the use permit had been issued in 1970. On August 31, 1976 Plaintiff also applied for a building permit,

submitting the same plans submitted to the CITY in 1969. The City's Zoning Administrator and Building Inspector refused to act on either of these applications, notwithstanding the fact that Plaintiff then possessed a right to obtain the use and building permits described in the applications pursuant to the P-C Ordinance.

(d) After Plaintiff requested on October 1, 1976 a one-year extension of the development schedule, Defendants again sought to impose upon Plaintiff's request regulations adopted after the P-C Ordinance, in particular the California Environmental Quality Act of 1973. On October 27, 1976 the City Council denied the appeal, thereby finally ruling that the development schedule ending on October 31, 1976 would not be extended.

(e) The CITY never issued another building or use permit for completion of Phase 2. The City, in failing to issue such permits, relied upon grounds not authorized by P-C Ordinance but imposed by regulations adopted subsequently thereto.

25. Plaintiff demonstrated, as required by Section 18.68 of CITY's Municipal Code, "good cause" for the one-year extension. Such good cause consisted in the history of the Project described above. As early as May 23, 1968, when the City Attorney wrote to Plaintiff concerning the availability of extensions to a development schedule, Plaintiff formed the reasonable expectation that, because the CITY had in fact customarily granted such extensions to other applicants, Plaintiff would also be granted an extension upon its request for good cause shown.

26. During the course of the history of the Project described above, Plaintiff invested these funds in the Phase 2 of the Project:

(a) $450,000 for the structural elements incorporated in Phase 1 as part of the construction of Phase 2.

(b) More than $65,000 for the preparation of architectural plans for the remaining six stories of the building.

(c) More than $450,000 for the fabrication of structural steel and elevators for the remaining six stories, expended in good faith reliance on the timely processing of Plaintiff's application for a building permit finally issued after delays on February 16, 1970.

(d) More than $20,000 for the preparation of revised plans and specifications to comply with the 1973 Uniform Building Code adopted in Palo Alto, in good-faith effort to compromise with the CITY, and an additional $5,000 or more in legal fees in connection with hearings before the Planning Commission and City Council.

(e) In excess of $10,000 for parking studies and revised parking plans submitted to the Planning Commission.

(f) $20,000 for the purchase of the six Power parcels to solve the parking needs for the ten-story building.

(g) $87,000 for acquisition of the Pierson parcel to overcome the CITY's objection to Plaintiff's zone-change application in September of 1976.

(h) In excess of $160,000 in total for parcels located at 228 Sheridan Avenue, 230 Sheridan Avenue, 320 Sheridan Avenue, and 2660 Park Boulevard, all near the Project, as possible sites for parking.

The above items constitute special damages suffered by Plaintiff as a result of Defendants' preventing completion of Phase 2. Plaintiff has also suffered additional special damages, the full nature and extent of which Plaintiff does not know, but will allege and prove at the appropriate time.

27. In addition, Plaintiff has suffered general damages in amounts not now known, including, but not limited to, the following:

(a) Loss of time by, and inconvenience to, its partners and the partners of its predecessor general partnership.

(b) Loss of profits from the existing four-story building.

(c) Loss of profits from the remaining six stories of the building which Plaintiff has a right to complete.

(d) Loss of increased appreciation in the four-story building and the remaining six stories together with the parking garage as a complete, integrated project.

Plaintiff has also suffered additional general damages, the full nature and extent of which Plaintiff does not know, but will allege and prove at the appropriate time.

28. By their conduct Defendants have appropriated, and taken without payment of just compensation, Plaintiff's property as described in paragraphs 26 and 27 preceding as well as the air-space above the existing four-story building, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

SECOND CLAIM FOR RELIEF

[Inverse Condemnation – California Constitution Art. 1, §19]

29. Plaintiff refers to, incorporates herein by reference in their entirety, and realleges the allegations contained in paragraphs 1 through 27, inclusive, of this Complaint.

30. By their conduct Defendants have confiscated, appropriated, and taken without payment of just compensation Plaintiff's property as described in paragraphs 26 and 27 above as well as the air-space above the existing four-story building; and such taking and/or damaging of property violates Article 1, §19 of the Constitution of the State of California.

31. Plaintiff is entitled to recover its reasonable costs, disbursements, and expenses, including attorney's and expert fees, pursuant to Section 1036 of the California Code of Civil Procedure.

THIRD CLAIM FOR RELIEF

[Denial of Equal Protection and Due Process of Law Under the Fourteenth Amendment, U.S. Constitution]

32. Plaintiff refers to, incorporates herein by reference in their entirety, and realleges the allegations of paragraphs 1 through 27, inclusive, of this Complaint.

33. In denying Plaintiff an extension of the development schedule contained in the P-C Ordinance, while routinely granting extensions to other applicants upon a showing of good cause under Section 18.68 of the City's Municipal Code, Defendants have unlawfully discriminated against Plaintiff, thereby denying to Plaintiff equal protection under the laws and depriving Plaintiff of its rights to due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

34. In seeking to apply to the Project regulations adopted after the P-C Ordinance and after Plaintiff had acquired a vested right to complete Phase 2 under the P-C Ordinance and regulations in effect at the time of its adoption, Defendants have deprived Plaintiff of its right to substantive due process of law in violation of the Fourteenth and Fifth Amendments to the Constitution of the United States.

FOURTH CLAIM FOR RELIEF

[Denial of Equal Protection and Due Process of Law under Art. 1, § 7 of the California Constitution]

35. Plaintiff refers to, incorporates herein by reference in their entirety, and realleges the allegations of paragraphs 1 through 27, inclusive, of this Complaint.

36. In denying Plaintiff an extension of the development schedule contained in the P-C Ordinance, while routinely granting extensions to other property owners upon a showing of good cause unlawfully discriminated against

Plaintiff, thereby denying Plaintiff equal protection under the laws and depriving Plaintiff of its right to due process of law in violation of Article 1, Section 7 of the Constitution of the State of California.

37. In seeking to apply requirements created by regulations adopted after the P-C Ordinance and after Plaintiff had acquired a vested right to complete Phase 2 under the P-C Ordinance and regulations in effect at the time of its adoption, Defendants have deprived Plaintiff of its right to substantive due process of law in violation of the Constitution of the State of California.

FIFTH CLAIM FOR RELIEF

38. Plaintiff refers to, incorporates herein by reference in their entirety, and realleges the allegations of paragraphs 1 through 28 and paragraphs 32 through 34, inclusive, of this Complaint.

39. Through their conduct as described above, Defendants have, under color of state law and municipal ordinances and regulations, deprived Plaintiff of its rights, privileges, and immunities secured by the Constitution of the United States and, in particular, the Fifth and Fourteenth Amendments thereto, in violation of Sections 1981 and following of Title 42 of the United States Code.

40. For such violation Plaintiff is entitled to recover special and general damages and described in paragraphs 26 and 27 of the First Claim of Relief.

41. As an alternative to such special and general damages, Plaintiff is entitled to equitable relief to restore the deprivation of its rights privileges, and immunities by Defendants. Such equitable relief consists in a mandatory injunction from this Court directing Defendants to permit Plaintiff to complete Phase 2 of the Project under the P-C Ordinance and regulations in the effect at the time of its adoption, without further discretionary approvals by the CITY. In addition to such relief, Plaintiff is entitled

to interim damages actually suffered during the period in which Defendants prevented Plaintiff from completing Phase 2; and Plaintiff asks leave to allege the amount of such damages and to prove the same when the amount becomes known.

SIXTH CLAIM FOR RELIEF

[Declaratory Relief]

42. Plaintiff refers to, incorporates herein by reference in their entirety, and realleges the allegations of paragraphs 1 through 41, inclusive, of this Complaint.

43. An actual controversy has arisen now exists between the Plaintiff, on the one hand, and Defendants, on the other hand, concerning their respective rights and duties in connection with the Project. Plaintiff contends that it has the right either

(a) to complete Phase 2 under the P-C Ordinance and the regulations in effect at the time of its adoption without further discretionary approvals by the CITY and, in addition, to receive full compensation for actual damages suffered during the period in which the CITY prevented completion of Phase 2 or, in the alternative,

(b) to receive full compensation for all special and general damages heretofore suffered by Plaintiff as a result of Defendant's conduct described above.

44. Plaintiffs is informed and believes, and alleges on the basis of such information and belief, that Defendants do not accept Plaintiff's contention but take a contrary position.

45. Plaintiff desires an immediate declaration of its rights in the Project. Such declaration is necessary and appropriate in order to resolve the controversy between Plaintiff and Defendants and to eliminate the injury previously

suffered, and still being suffered, by Plaintiff so long as Defendants prevent Plaintiff from completing Phase 2 of the Project.

WHEREFORE Plaintiff prays for judgment against Defendants, and each of them, as follows:

1. For the special damages described in paragraph 26 above according to proof.
2. For the general damages described in paragraph 27 above according to proof.
3. A declaration of the respective rights, duties and obligations of the parties.
4. Plaintiff's reasonable attorneys' fees in this action.
5. Costs arising from the prosecution of this action.
6. Interest as provided by law and determined by this Court on all items of special and general damages requested in paragraphs 1 and 2 of this prayer.
7. For such other, further and additional relief as this Court may deem appropriate.

In the alternative, Plaintiff prays for judgment against Defendants, and each of them, as follows:

A. Equitable relief in the nature of a mandatory injunction allowing Plaintiff to complete Phase 2 of the Project under the P-C Ordinance and the regulations in effect at the time of its adoption without further discretionary approvals by CITY.

B. Interim damages in the amount to be proven at trial for losses, costs, and expenses incurred by Plaintiff during the period in which Defendants prevented the completion of Phase 2 of the Project.

C. Costs arising from the prosecution of this action.

D. Plaintiff's reasonable attorneys' fees in this action.

E. Interest as provided by law and determined by this Court on all of the losses, costs and expenses described in paragraph B of this alternative prayer.

F. For such other, further and additional relief as the Court may deem appropriate.

Dated: December 3, 1981.

BERLINER, COHEN & BIAGINI

By Jeffrey P. Widman
Attorney for Plaintiff

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury under Rule 38(b) of the Federal Rules of Civil Procedure.

Dated December 3, 1981

BERLINER, COHEN & BIAGINI
By JEFFERY P. WIDMAN
Attorneys for Plaintiff

Original
FILED
June 4 1982
William Whittaker
Clerk, U.S. District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

COURT HOUSE PLAZA COMPANY, a limited partnership,	)	No. C-81-4537 SC
Plaintiff,	)	
-vs-	)	
THE CITY OF PALO ALTO, a municipal corporation, et al.,	)	ORDER GRANTING MOTION TO DISMISS
Defendants.	)	

ORDER GRANTING MOTION TO DISMISS

Plaintiff, a building developer, seeks damages and equitable relief for the actions of the Palo Alto City Council and its Planning Commission in denying building and use permits for the second phase in the construction of a ten-story office building and in denying a one-year extension of the building's development schedule provided by a municipal zoning ordinance. Because plaintiff's action is precluded by the *res judicata* effect of a prior judgment in state court, plaintiff's action must be dismissed.

After the city council's denial of plaintiff's application for the necessary permits and extension of time, plaintiff sought a writ of mandamus from the California Superior Court. Plaintiff was denied relief in superior court and on appeal. *See Court House Plaza Co. v. City of Palo Alto*, 17 Cal. App. 871, 173 Cal. Rptr. 161 (1981). Plaintiff now seeks relief on six causes

of action: federal and state constitution "taking" claims (inverse condemnation); federal and state constitution equal protection and due process claims; a federal civil rights claim; and a declaratory judgment claim. The latter two claims rest on the constitutional violations alleged in the first four, and contain no independent factual allegations.

The doctrine of *res judicata* prevents a plaintiff from relitigating claims adjudicated in another prior proceeding. The Ninth Circuit has extended *res judicata* to ban federal constitutional claims, whether or not asserted in state court,

> where the federal constitutional claim is based on the same asserted wrong as was the subject of [the] state action, and where the parties are the same.

Scoggin v. Schrunk, 522 F. 2d 436, 437 (9th Cir. 1975).

The federal claims here are based on the same alleged wrongful acts which formed the basis of plaintiff's state court mandamus action. Also, plaintiff has sued all the same defendants with the exception of one individual named in the state court proceeding. Consistent with *Scoggin*, plaintiff's claims for declaratory relief, for relief under the civil rights act, and for the alleged federal constitutional violations on which those claims are barred by *res judicata*.

Plaintiff's citation of *Gallagher v. Frye*, 631 F. 2d 127 (9th Cir. 1980) is inapposite. The court in *Gallagher* distinguished *Scoggin* on the facts. In *Scoggin*, plaintiff sought to set aside a foreclosure sale in federal court, after being unable to successfully challenge it in state court. In *Gallagher*, however, plaintiff's initial state court mandamus proceeding attempted to enforce an administrative order of a civil service board against a museum. Plaintiff's federal claim addressed defendant's underlying act of employment termination. The essential issue in the state court proceeding was "the jurisdictional authority of of the state administrative agency." *Id.* at 129-30. The issue in the federal court proceeding was whether the alleged wrongful conduct of the defendant museum violated plaintiff's civil rights.

In the instant case, the alleged violations of the federal constitution have been adjudicated in state court. The state court of appeal upheld the trial court's findings that the denial of the time extension did not deprive plaintiff of equal protection or due process of law, *Court House Plaza v. City of Palo Alto*, 117 Cal. App. 3d at 883, and that the city's adverse zoning action did not constitute a "taking" requiring compensation. *Id.* at 888. Furthermore, even assuming that these constitutional claims had not been raised, having had the ability to raise the federal claims in the state court proceedings bars this court from adjudicating them now. *Scoggin v. Schrunk*, 522 F. 2d at 437.

Finally, when a district court, as in this case, dismisses all federal claims prior to trial, "the proper exercise of discretion requires dismissal" of the state claims. *Wren v. Sletten Construction Co.*, 654 F. 2d 529, 536 (9th Cir. 1981). Such claims should be dismissed for want of federal jurisdiction. *Hodge v. Mountain States Tel. & Tel. Co.*, 555 F. 2d 254, 261 (9th Cir. 1977).

In accordance with the foregoing, it is hereby ordered that defendants' motion to dismiss plaintiff's complaint is granted.

Dated: June 4, 1982

SAMUEL CONTI
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

COURT HOUSE PLAZA COMPANY, a limited partnership, Plaintiff,	) No. C-81-4537 SC
-vs-	) JUDGEMENT
THE CITY OF PALO ALTO, a municipal corporation, et al., Defendants.	

It is hereby ordered, adjudged and decreed that defendants' motion to dismiss plaintiff's complaint is granted in accordance with the order entered by the court herein.

Dated: June 4, 1982.

SAMUEL CONTI

United States District Judge

Entered in Civil Docket 6-11 1982

APPENDIX B

(1) Memorandum of the United States Court of Appeals for the Ninth Circuit filed on May 2, 1983

(2) Judgment of the United States Court of Appeals for the Ninth Circuit filed on May 2, 1983

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COURT HOUSE PLAZA COMPANY, a limited partnership,	
Plaintiff-Appellant,	
v.	No. 82-4393
THE CITY OF PALO ALTO, a municipal corporation, STANLEY R. NORTON, BYRON D. SHER, FRED S. EYERLY, ROY L. CLAY, KIRKE W. COMSTOCK, SCOTT T. CAREY, JOHN J. BERWALD, ANNE R. WITHERSPOON, JOHN V. BEARS, Councilmen, PETER R. CARPENTER, MARY R. GORDON, WILLIAM E. GREEN, JAY W. MITCHELL, EMILY M. RENZEL ANNE STEINBERG, Planning Commissioners, STAN J. NOWICKI, Chief Building Inspector, JAMES O. GLANVILLE, Zoning Administrator, NAPTHALI H. KNOX, Director of Planning and Community Environment, ROBERT K. BOOTH, JR., City Attorney and LOUIS B. GREEN, Assistant City Attorney,	DC #CV-81-4537-SC MEMORANDUM
Defendants-Appellees.	

Appeal from the United States District Court
for the Northern District of California
Samuel Conti, District Judge, Presiding
Argued and submitted April 14, 1983

Before: KILKENNY, SCHROEDER, and BOOCHEVER, Circuit Judges.

The district court's dismissal, on res judicata grounds, of this federal civil rights action must be affirmed under *Scoggin v. Schrunk*, 522 F.2d 436 (9th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1979).

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COURT HOUSE PLAZA COMPANY, a limited partnership, Plaintiff/Appellant, v. THE CITY OF PALO ALTO, a municipal corporation, STANLEY R. NORTON, BYRON D. SHER, FRED S. EYERLY, ROY L. CLAY, KIRKE W. COMSTOCK, SCOTT T. CAREY, JOHN J. BERWALD, ANNE R. WITHERSPOON, JOHN V. BEARS, Councilmen, PETER R. CARPENTER, MARY R. GORDON, WILLIAM E. GREEN, JAY W. MITCHELL, EMILY M. RENZEL ANNE STEINBERG, Planning Commissioners, STAN J. NOWICKI, Chief Building Inspector, JAMES O. GLANVILLE, Zoning Administrator, NAPTHALI H. KNOX, Director of Planning and Community Environment, ROBERT K. BOOTH, JR., City Attorney and LOUIS B. GREEN, Assistant City Attorney, Defendants-Appellees.	)	No. 82-4393 DC CV 81-4537 SC Judgment

APPEAL from the United States District Court for the Northern District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered: May 02, 1983

APPENDIX C

Constitutional and Statutory Provisions Involved

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. United States Constitution, Amendment XIV, Sections 1 and 5:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

3. Title 28, United States Code Section 1738:

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of

the clerk, and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

4. Title 42, United States Code Section 1981:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

5. Title 42, United States Code Section 1982:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

6. Title 42, United States Code, Section 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.